Office-Supreme Court, U.S.
FILED
MAR 31 1983
ALEXANDER L. STEVAS,
CLERK

Docket No. 81-2332

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, A POLITICAL SUBDIVSION OF THE COMMONWEALTH OF VIRGINIA,
Petitioner,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITIONER'S BRIEF ON THE MERITS

FRANCIS N. CRENSHAW *
HOWARD W. MARTIN, JR.
ANN K. SULLIVAN
CRENSHAW, WARE & JOHNSON
1640 Virginia National Bank Building
One Commercial Place
Norfolk, Virginia 23510
Phone (804) 623-3000
Counsel for Petitioner

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether The Chesapeake & Potomac Telephone Company of Virginia ("C&P"), a public service corporation operating under the laws of the Commonwealth of Virginia, is a "displaced person" under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 84 Stat. 1894, 42 U.S.C. § 4601 *et seq.* (the "URA"), when it seeks reimbursement for the costs of removing its telephone distribution facilities from public rights-of-way in the execution of an urban renewal project funded in part by grants from the Department of Housing and Urban Development ("HUD").

THE PARTIES TO THE PROCEEDINGS BELOW

The complaint was filed in the District Court below by C&P against Moon Landrieu, in his official capacity as Secretary of Housing and Urban Development and against Norfolk Redevelopment and Housing Authority ("NRHA"). Both defendants took identical positions in opposition to the C&P claim in the District Court and in the appeal by C&P to the Circuit Court of Appeals for the Fourth Circuit. After the litigation was commenced, HUD and NRHA entered into a financial settlement of the urban renewal projects in which the C&P claim arose. As a result of that settlement the responsibility for payment of any judgment rendered in this case will fall upon NRHA, not HUD. Accordingly, HUD did not join in the Petition for Certiorari.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
THE PARTIES TO THE PROCEEDINGS BELOW	ii
OPINIONS BELOW	1
JURISDICTION	1
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	6
ARGUMENT	9
I. UNDER ITS FRANCHISE C&P ACQUIRED NO PROPERTY RIGHTS AND IS REQUIRED TO MOVE ITS FACILITIES FROM A PUBLIC RIGHT-OF-WAY AT ITS EXPENSE	9
A. The Franchise Ordinance	9
B. The Applicable Law	10
II. THE DECISIONS WHICH HAVE HELD THAT THE URA DID NOT CHANGE THE COMMON LAW CONTAIN SOUNDER LOGIC AND A MORE CAREFUL ANALYSIS THAN THAT FOUND IN THE OPINION OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT	13
A. The decision of the Circuit Court of Appeals for the Fourth Circuit	13
B. Other courts which have construed the URA have held that a utility company is not a "displaced person" with reference to the relocation of transmission facilities	14

TABLE OF CONTENTS—Continued

Page

C. This court refused a claim for relocation benefits under the "written order" clause of the URA which was based on the theory that the right supporting the claim was implied in the language of the URA 15

D. The comparison of C&P's rights to those of a tenant at will used by the court below is not appropriate 17

E. If the cost of relocating its transmission lines is to be shifted away from C&P, a clear statutory mandate is required to change the existing common law 18

III. THE LEGISLATIVE HISTORY OF THE URA DOES NOT SUPPORT THE CLAIM BEING ASSERTED BY C&P 20

IV. IN CONTRAST TO THE ABSENCE OF CONGRESSIONAL INTENT TO PROVIDE REIMBURSEMENT FOR UTILITY RELOCATION IN THE URA, THE FEDERAL-AID HIGHWAY ACT AND ITS LEGISLATIVE HISTORY DEMONSTRATE A CLEAR INTENT TO PERMIT REIMBURSEMENT FOR UTILITY RELOCATION UNDER CERTAIN CIRCUMSTANCES 25

V. THE ADMINISTRATION OF THE URA BY FEDERAL AGENCIES AND THE SUBSEQUENT ACTION OF CONGRESS SUPPORT THE CONTENTIONS OF NRHA 28

A. The agencies 28

B. Inconsistent Congressional action 29

VI. UNDER VIRGINIA LAW THE C&P FACILITIES INVOLVED IN THIS CLAIM ARE REAL PROPERTY, NOT PERSONALTY 32

TABLE OF CONTENTS—Continued

	Page
VII. C&P DID NOT MOVE ITS TRANSMISSION LINES AS A RESULT OF THE ACQUISITION OF LAND	35
A. C&P moved its facilities because of the requirements of the Franchise	35
B. The acquisition of land in the several projects, having been completed well before C&P was required to move, did not cause the relocation of the C&P facilities	36
CONCLUSION	39

TABLE OF AUTHORITIES

CASES: Page

Alexander v. *HUD*, 441 U.S. 39 (1979) 15, 16
Artesian Water Co. v. *State Dept. of Highways & Transp.*, 330 A.2d 432 (Del. 1974) 10, 14, 30
Bangor-Hydro Electric Co. v. *Johnson*, 226 A.2d 371 (Me. 1967) 34
Bell Telephone Co. of Pennsylvania v. *Pennsylvania Public Utility Comm'n*, 139 Pa. Super. Ct. 529, 12 A.2d 479 (1940) 12
Central Maine Power Co. v. *Waterville Urban Renewal Auth.*, 281 A.2d 233 (Me. 1971) 10, 11, 13
Chesapeake & Potomac Telephone Co. v. *Landrieu*, No. 79-906-N (E.D. Va. June 4, 1980), rev'd, 674 F.2d 298 (4th Cir. 1982) cert. granted Jan. 17, 1983 6
City of Lynchburg v. *Peters*, 145 Va. 1, 133 S.E. 674 (1926) 37
Consumers Power Co. v. *Costle*, 615 F.2d 1147 (6th Cir. 1980) 38
Delaware River Port Auth. v. *Pennsylvania Public Utility Comm'n*, 393 Pa. 639, 145 A.2d 172 (1958) 14, 19
Hampton Roads Sanitation District Comm'n v. *Chesapeake*, 218 Va. 696, 240 S.E.2d 819 (1978).. 12
Heller v. *Woodley*, 202 Va. 994, 121 S.E.2d 527 (1961) 37
Holden v. *New York Telephone Co.*, 31 A.D.2d 812, 298 N.Y.S.2d 256 (1969) 36
Humble Oil & Refining Co. v. *Copeland*, 398 F.2d 364 (4th Cir. 1968) 33
Lone Star Gas Co. v. *Landrieu*, No. 80-100-C (E.D. Okla. March 30, 1981) 15
Mountain States Telephone & Telegraph Co. v. *Boise Redevelopment Agency*, No. 52891 (Dist. Ct. Idaho, Oct. 27, 1980) 14, 15
Mumpower v. *Housing Auth.*, 176 Va. 426, 11 S.E.2d 732 (1940) 4
National Fuel Gas Distribution Corp. v. *Niagara Frontier Transp. Auth.*, Civil No. 78-843 (W.D. N.Y. Feb. 6, 1980) 15

TABLE OF AUTHORITIES—Continued

Page

New Orleans Gaslight Co. v. *Drainage Comm'n of New Orleans*, 197 U.S. 453 (1905) 6, 10, 12
Norfolk & Western Railway Co. v. *Virginia Railway Co.*, 110 Va. 631, 66 S.E. 863 (1910) 20
Opinion of the Justices, 101 N.H. 527, 132 A.2d 613 (1957) 18
Pacific Telephone & Telegraph Co. v. *Redevelopment Agency of Glendale*, 151 Cal. Rptr. 68, 87 Cal. App. 3d 296 (1978) 14
Pennhurst State School and Hospital v. *Halderman*, 451 U.S. 1 (1981) 39
PEPCO v. *Fugate*, 211 Va. 745, 180 S.E.2d 657 (1971) 10
Port of New York Auth. v. *Hackensack Water Co.*, 41 N.J. 90, 195 A.2d 1 (1963) ..10, 12, 14, 16, 20, 33, 36
Shaw v. *Merchants' National Bank of St. Louis*, 101 U.S. 557 (1880) 20
State v. *Idaho Power Co.*, 81 Idaho 487, 346 P.2d 596 (1959) 10, 12
Transcontinental Gas Pipe Line Corp. v. *Prince William County*, 210 Va. 550, 172 S.E.2d 757 (1970) 33, 34

STATUTES:

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1361 1
28 U.S.C. § 1331(a) 1
42 U.S.C. § 1453 2
42 U.S.C. § 1456(1) 1
42 U.S.C. § 4601 *et seq.* 2, 17, 32, 35
District of Columbia Public Utilities Reimbursement Act of 1972, P.L. No. 92-495, 86 Stat. 812 (1972) 30
Federal-Aid Highway Act of 1956, Pub. L. No. 627, 87 Stat. 250 (1956) 7, 11, 18, 27, 30
Federal-Aid Highway Act of 1958, Pub. L. No. 85-831, 72 Stat. 89 (1958) 7, 30
Federal-Aid Highway Act of 1968, Pub. L. No. 90-495, 82 Stat. 815 (1968) 7, 21, 30

TABLE OF AUTHORITIES—Continued

Page

Housing and Urban Development Act of 1968, Pub. L. No. 92-213, 85 Stat. 775 (1968) 7, 21
Tennessee Valley Authority Act of 1933, ch. 32, 48 Stat. 58, as amended, 49 Stat. 1080 20
Va. Code § 33.1-55 27

FEDERAL REGULATIONS:

7 CFR Part 21 (1981) 28
7 CFR § 652 (1981) 28
13 CFR Part 308 (1981) 28
15 CFR Part 916 (1981) 28
18 CFR Part 1306 (1981) 28
23 CFR Part 740 (1981) 28
24 CFR § 42.1 *et seq.* 29
24 CFR Part 42 (1981) 28
29 CFR Part 12 (1981) 28
29 CFR Part 91 (1981) 28
32 CFR Part 641 (1981) 28
32 CFR Part 742 (1981) 28
34 CFR Part 15 (1981) 28
36 CFR Part 904 (1981) 28
38 CFR Part 25 (1981) 28
39 CFR Part 777 (1981) 28
40 CFR Part 4 (1981) 28
40 CFR Part 30.405-2 (1981) 28
41 CFR Part 101-18 (1981) 28
41 CFR Part 114-50 (1981) 28
41 CFR Part 128-18 (1981) 28
45 CFR Part 15 (1981) 28
49 CFR Part 25 (1981) 28

CONGRESSIONAL REPORTS:

H.R. Doc. No. 127, 84th Cong., 1st Sess. (1955) 27
House Comm. on Public Works, Select Subcomm. on Real Property Acquisition, 88th Cong., 2d Sess. Study of compensation and assistance for Persons affected by real property acquisition in federal & federally assisted programs (Comm. Print 1964) 17, 20, 21

TABLE OF AUTHORITIES—Continued

Page

Hearings before the Comm. on Public Works House of Representatives 14898, H.R. 14899, S.1 and related bills, 91st Cong., 1st & 2d Sess. (1969-1970) 29
H.R. Rep. No. 91-1656, 91st Cong., 1st Sess. (1970) 1970 U.S. Code Cong. & Ad. News 5850 ..... 22, 23, 38
H.R. Rep. No. 92-906, 92d Cong., 2d Sess. (1972) .. 30, 31
S. Rep. No. 91-488, 91st Cong., 1st Sess. (1969) 14, 21, 22, 28, 30
S. Rep. No. 1093, 1954 U.S. Code Cong. and Ad. News 2162 25
S. Rep. No. 1407, 85th Cong., 2d Sess. (1958) 24

MISCELLANEOUS:

51 Comp. Gen. 167 (1971) 32
HUD Urban Renewal Handbook RHA, Sec. 7209.1 29
Special Report 91, *Relocation of Public Utilities 1956-1966, An Analysis of Legal Aspects*, 3 Highway Research Board, Division of Engineering, National Academy of Sciences and National Research Council, National Academy of Engineering (referred to as Special Report 91) 6, 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

Docket No. 81-2332

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, A POLITICAL SUBDIVSION OF THE COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITIONER'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 674 F.2d 298. The opinion of the United States District Court for the Eastern District of Virginia is unreported, but is set out in Appendix B to the Petition for Certiorari and in the Joint Appendix (hereinafter "A.") at p. 48. Jurisdiction in the District Court was invoked under 28 U.S.C. § 1331(a), 28 U.S.C. § 1361 and 42 U.S.C. § 1456(1).

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was rendered on March 25, 1982. The Petition for Certiorari was filed on June 22, 1982, within

ninety days from the date of the judgment of the Court of Appeals. The Writ of Certiorari was granted by this Court on January 17, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statute involved in this case is the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 84 Stat. 1894, 42 U.S.C. § 4601, *et seq.* The pertinent provisions of the statute are set out in the Appendix to the Petition for Certiorari.

The provisions of the URA which are particularly relevant to this case appear at 42 U.S.C. § 4601 as follows:

> (5) The term 'person' means any individual, partnership, corporation or association.
>
> (6) The term 'displaced person' means any person who, on or after January 2, 1971, moves from real property, or moves his personal property from real property as a result of the acquisition of such real property, in whole or in part, or as the result of the written order of the acquiring agency to vacate real property, for a program or project undertaken by a Federal agency, or with Federal financial assistance . . .

STATEMENT OF THE CASE

Norfolk Redevelopment and Housing Authority ("NHRA"), which is a political subdivision of the Commonwealth of Virginia, has undertaken four redevelopment or conservation projects federally funded under Title I of the Housing Act of 1949 (specifically 42 U.S.C. § 1453) in order to eliminate slums and blight and to prevent their recurrence by means of the wholesome redevelopment of the project areas. In each project NRHA adopted a plan prescribing the public action which was contemplated. These actions included the acquisition of private property, demolition of blighted buildings, realignment of street patterns, rezoning, construction of speci-

fied site improvements and disposition of the land for public or private uses.

After each plan was adopted by NHRA it was approved by the Council of the City of Norfolk. The three redevelopement projects encompassed the most blighted or worst buildings in certain areas of the City, and the plans for these projects called for the acquisition of virtually all of the land in each project area and demolition of the buildings situated thereon. The conservation project covered an area where the properties were deteriorating; but as most structures could be saved, the planned acquisition of land and demolition of buildings in the conservation project area was infrequent and selective (A. 190).

After approval of the redevelopment and conservation plans by the City, and after execution of grant-in-aid contracts with HUD,[1] NRHA commenced the acquisition of individual properties within the several project areas. It took several years to acquire all of the lots upon which private homes or other structures had been erected. For example, in the Rosemont Redevelopment Project, acquisition of individual parcels began in 1963 and was not completed until 1968 (A. 250-257).

The primary purpose of the redevelopment plans was to eliminate blight and to prevent its recurrence. Thus, after the blighted properties had been acquired and cleared, the land was made available for development and a new street pattern was developed by NRHA and the appropriate City departments. The framework of the streets was dependent on traffic expectations related to

---

[1] Under the conventional urban renewal concept, HUD furnished two-thirds of the net project cost. The City of Norfolk was required to provide (either in cash or by approved public works) the remaining one-third of the net project cost. In the projects here involved the City provided its one-third share by means of public improvements and all of the cash required was provided by HUD (A. 187-188).

the new development which was expected within the project area (A. 197-198). However, NRHA has no legislative power to close streets, and under Virginia law the City Council cannot agree in advance to close streets (i.e., at the time the urban renewal plans are adopted by NRHA or approved by the City.[2] Accordingly, NRHA filed petitions to close individual streets or parts thereof after the land on both sides of the streets had been acquired (A. 40-41). The City of Norfolk subsequently adopted ordinances closing each of the streets for which a petition had been filed.

C&P is a public service corporation licensed to do business in the State of Virginia and in the City of Norfolk. Pursuant to its written franchise agreement, it had placed telephone transmission facilities within the public rights-of-way of certain streets throughout the City of Norfolk, including streets lying within the urban renewal project area. These facilities consisted primarily of large concrete structures, conduits, cables and accessory fittings buried under the surface of the streets.[3] When the urban renewal plans were being considered, and in the public hearings conducted prior to their adoption, C&P became well aware that some of its facilities would have to be discontinued in the old streets and reinstalled to conform

---

[2] *Mumpower* v. *Housing Auth.*, 176 Va. 426, 452, 11 S.E.2d 732, 743 (1940).

[3] The testimony of Mr. Tucker and the graphic Exhibits 11-16 amply demonstrate the massive nature of the C&P facilities (A. 110-141). The cables were one to three inches in diameter, containing as many as 3,600 pair of wires (A. 102, 121), buried in conduits consisting of plastic pipe four inches in diameter, twenty feet long glued one to the other and encased in concrete when they crossed roadways (A. 112-115). The cables are ordered to exact lengths to fit the distance between specific manholes (A. 116), which have walls of concrete a foot thick, are roughly seven feet high, twelve feet long and six feet deep with two feet of dirt over the foot-thick roofs (A. 117-120). The cables have an estimated life of 40 years (A. 121) and when they are put in place they are expected to stay there that length of time (A. 122).

to the new street patterns. A cooperative effort was made by C&P, NRHA and the City of Norfolk to facilitate this removal (A. 167, 170-171, 219).

After the streets were closed and the new street patterns were established under the guidance of the City of Norfolk, C&P discontinued its lines in the old street beds. It left in place the massive conduits and structures which had been buried in the ground and withdrew from them the telephone cables which were then either junked or salvaged (A. 100, 101). As the new streets were built, C&P was permitted, under its franchise agreement with the City of Norfolk (A. 228), to relocate its facilities within the new street rights-of-way in the project areas. C&P paid nothing for the privilege of placing its lines in the new streets, just as it had paid nothing to place them in the old streets.

On May 4, 1975, C&P filed a claim for the non-betterment cost of reestablishing its lines in the new streets in the Rosemont Redevelopment Project, such work having been done between March of 1972 and December of 1974. This claim was a departure from established practice under the City franchise agreement pursuant to which relocations had been made at C&P expense (Stipulations 10 and 11, A. 43-44), and it was the first time any utility had claimed reimbursement from NRHA under the URA for relocation from public rights-of-way. Subsequently, C&P filed additional claims for work in other projects, the last claim being filed on August 17, 1977 (A. 265) When the C&P claims were denied by NRHA, an appeal was taken to the Richmond Area Office of HUD. On June 18, 1979, HUD issued a letter denying the C&P claims (A. 263).

Thereafter, on October 1, 1979, C&P filed a complaint in the United States District Court for the Eastern District of Virginia praying for a judgment declaring that C&P was eligible for relocation payments under the URA, for an order in the nature of a mandate ordering HUD

to direct NRHA to pay the C&P claim, and praying that the Court enter judgment against HUD and NRHA for the sum of $686,422.23, plus interest from the date the relocation work was actually done (A. 12-14).

On June 4, 1981, the United States District Court for the Eastern District of Virginia issued its memorandum opinion determining that C&P was not a "displaced person" as contemplated by the URA and was not entitled to the relief which it sought. An order to that effect was entered on the same date (A. 48, 62).

C&P appealed the decision of the District Court and on March 25, 1982, the United States Court of Appeals for the Fourth Circuit reversed the District Court and remanded the case for further proceedings consistent with its opinion (A. 63). A stay of the mandate was granted pending the filing of a Petition for a Writ of Certiorari to this Court. The Petition was filed June 22, 1982, and a Writ of Certiorari was granted on January 17, 1983.

SUMMARY OF THE ARGUMENT

Prior to the passage of the URA, the common law rule was that those utilities which placed their facilities in or under public ways pursuant to franchise agreements with state or local governments acquired no vested property interest, and had to remove or relocate those facilities at the expense of the utility company when requested to do so by the appropriate state or local government. This rule is of long standing, dating at least from 1905 when this Court decided *New Orleans Gaslight Co.* v. *Drainage District of New Orleans*, 197 U.S. 453 (1905). The rule was firmly established and well understood by the Congress when it passed the Federal-Aid Highway legislation in 1954, 1956 and 1958.[4]

---

[4] Special Report 91, *Relocation of Public Utilities 1956-1966, An Analysis of Legal Aspects*, 3, Highway Research Board, Division of Engineering, National Academy of Sciences and National Research Council, National Academy of Engineering (referred to as Special Report 91).

After substantial debate and an intensive congressional study, which culminated in a 74-page report entitled *Public Utility Relocation Incident to Highway Improvement*, H.R. Doc. No. 127, 84th Cong., 1st Sess. (1955), Congress adopted the Federal-Aid Highway Act of 1956, Pub. L. No. 627, 87 Stat. 250, which, at Section 11, permitted the use of federal funds to reimburse a state (in the same proportion as federal funds were expended on the project) when the state paid the cost of utility relocation under the laws of that state. Thus, under Section 11 of the Federal-Aid Highway Act of 1956 (which became Section 123 of the Federal-Aid Highway Act of 1958, 72 Stat. 89, Pub. L. No. 85-831) a pattern was established for using federal funds in reimbursement of payments made by a state which were not in violation of the state laws. No federal right of utility companies to receive payment was created. The common law of the several states was unchanged.

During the decade of the 1960's an intensive study was implemented by Congressional committees to provide the basis for legislation aimed at the elimination of inequities which resulted from the acquisition of real property by Federal and federally assisted programs, and the standardization of the relocation benefits for persons displaced by such acquisition.

The thrust of the legislation (the URA) which emerged from the studies and hearings in the sixties was to provide for fair and equitable treatment of persons displaced by acquisition of their homes, businesses and farms. The URA followed as closely as possible the relocation provisions of the Housing and Urban Development Act of 1968, Pub. L. No. 92-213, 85 Stat. 775, and the Federal-Aid Highway Act of 1968, Pub. L. No. 90-495, 82 Stat. 815, modifying them only for uniformity. Several provisions of the Federal-Aid Highway Act were repealed by the URA and their purposes were accommodated in the URA, but the provision which pertained to reimbursement to

states which paid utility relocation costs (Section 123) was neither repealed nor incorporated into the URA. The subject of relocating utility transmission lines from public rights-of-way was not addressed in the URA or in its legislative history.

Thus, after the URA became law, the following legal principles were in full force and effect:

(a) the common law of a great majority of the states required a utility to relocate at its expense where it occupied the public rights-of-way under a franchise;

(b) Section 123 of the Federal-Aid Highway Act permitted partial federal reimbursement to those states which paid relocation expenses if such payments were not in violation of state law or contract;

(c) HUD regulations declared that the payment of relocation costs to a private utility was an ineligible project expenditure unless required under state law; and

(d) the URA, which did not change any of the above.

The conclusion is inescapable that Congress had no intention of changing, and did not change, the common law as it pertains to reimbursement of utility relocation costs. This conclusion is consistent with the practice of the federal and local governments. None of the governmental units paid for such relocation without specific statutory authority, and there were no provisions for such payment in the rules governing relocation benefits which were published in the Federal Register or the Code of Federal Regulations.

In order to be eligible for benefits under the URA, C&P must demonstrate that it is a "displaced person" as defined in the statute. That portion of our argument which is summarized above demonstrates that, in respect to the relocation of its transmission lines, a utility was never contemplated by Congress as a displaced person. Even if this were not true, however, C&P could not recover.

C&P has failed to prove that it moved *personal property* as a result of the *acquisition of real property.*

The transmission facilities of C&P which are involved in this litigation are real property under the law of Virginia. The relocation of these C&P facilities was caused by a termination of its franchise by the closing of streets, and not as a result of the acquisition of real property by NRHA.

ARGUMENT

I. UNDER ITS FRANCHISE C&P ACQUIRED NO PROPERTY RIGHTS AND IS REQUIRED TO MOVE ITS FACILITIES FROM A PUBLIC RIGHT-OF-WAY AT ITS EXPENSE

A. The Franchise Ordinance

By ordinance adopted by the Council of the City of Norfolk, Southern Bell Telephone and Telegraph Company was given a franchise (the "Francise") to place, maintain and operate its wires and fixtures over and under the surface of public ways for the purpose of "transmitting communication by electricity". C&P has succeeded to the rights of Southern Bell and has placed its facilities in and under the public streets of Norfolk as needed to serve its subscribers. The rights given by the Franchise are non-exclusive and do not prevent the City from granting similar privileges to other individuals, and the City has reserved the right to amend, alter or repeal the ordinance at its pleasure without providing compensation for any damage which might result (A. 240-241).

Under this arrangement C&P has moved its lines without compensation whenever required to do so in accommodation of street improvements or alterations. (See Stipulation, Paragraphs 10 and 11, Final Pre-trial Order, A. 43-44; and Testimony of George W. Austin, Chief Highway Engineer for the City of Norfolk, A. 226).

B. The Applicable Law

The Supreme Court of Virginia, in *Potomac Electric Power Company* v. *Fugate*, 211 Va. 745, 180 S.E.2d 657 (1971), described the rights possessed by a utility company under such an arrangement as follows:

> This being true, we think the trial court accurately characterized the nature of the interests involved here when it ruled that the 'rights [the plaintiffs] have to place their facilities are not property rights [and they] would have to remove and relocate on request of the grantor in each case.' So what we are dealing with are mere licenses, revocable at will, permitting installation of the plaintiffs' utility facilities. . . . (Id. at 747)
>
> This argument, as the defendant points out, is certainly circular in nature and, moreover, overlooks the common law rule, recognized in Virginia, imposing upon a utility the burden of relocating facilities at its own costs when it occupies highway property under rights of the nature held by the plaintiff. . . . (*Id.* at 748)

This statement of the common law was accepted by the District Court below and was not challenged by the Court of Appeals for the Fourth Circuit. It is broadly recognized as the existing state of the common law.[5]

In *New Orleans Gaslight Co.* v. *Drainage Commission of New Orleans*, 197 U.S. 453 (1905), which involved gas lines which had to be moved to facilitate proper drainage in the city, the Court said:

---

[5] *New Orleans Gaslight Co.* v. *Drainage Comm'n of New Orleans*, 197 U.S. 453, 461 (1905); *Artesian Water Co.* v. *State Dept. of Highways & Transp.*, 330 A.2d 432, 436 (Del. 1974); *Central Maine Power Co.* v. *Waterville Urban Renewal Auth.*, 281 A.2d 233 (Me. 1971); *Port of New York Auth.* v. *Hackensack Water Co.*, 41 N.J. 90, 195 A.2d 1 (1963); *State* v. *Idaho Power Co.*, 81 Idaho 487, 346 P.2d 596 (1959).

> The gas company, by its grant from the city, acquired no exclusive right to the location of its pipes in the streets, as chosen by it, under a general grant of authority to use the streets. The city made no contract that the gas company should not be disturbed in the location chosen. In the exercise of the police power of the state, for a purpose highly necessary in the promotion of the public health, it has become necessary to change the location of the pipes of the gas company so as to accommodate them to the new public work. In complying with this requirement at its own expense, none of the property of the gas company has been taken, and the injury sustained is *damnum absque injuria*. (*Id.* at 462)

The same principle was recognized in *Central Maine Power Co.* v. *Waterville Urban Renewal Authority*, 281 A.2d 233 (Me. 1971). In that case the utility company was required to bear the additional costs of underground installation instead of an aerial location. The Court treated this as the relocation of facilities in a public right-of-way and ruled that the municipality cannot reimburse a utility for its relocation expenses without "express authority from the legislature." (*Id.* at 236)

It was because of this rule of law that some states passed enabling acts specifically permitting reimbursement of utility relocation costs in highway construction situations in order to take advantage of the Federal-Aid Highway Act of 1956 under to which a utility company's relocation expenses could be reimbursed when such reimbursement was not violative of state law. Legislation was introduced in forty states to authorize such payments. Only twenty two of those bills were passed, however, and of those which were passed, six were vetoed by the governor of the state involved. However, that flurry of legislation subsided within a few years and by 1965 it was reported that the situation concerning reimbursement for utility relocation costs seemed to have stabilized.[6]

---

[6] Special Report 91, *supra* note 4, at 3.

Some of the state laws permitting payment of utility relocation costs were challenged in court. Thus, the Supreme Court of Idaho in *State* v. *Idaho Power Co.*, 81 Idaho 487, 346 P.2d 596, (1959) declared that a state statute which authorized payment of relocation costs to utilities from the state highway fund as part of the cost of constructing a highway resulted in an unconstitutional invasion of the highway fund. In reaching its decision, the Idaho Court analyzed the legal rights involved and cited many authorities from other jurisdictions for the proposition that a utility company which places its facilities under the public streets acquires no property right thereby and must move them, without reimbursement, when directed to do so.

C&P has not challenged this principle of law, but in its arguments below has contended that there is a difference between the requirement to move from a street right-of-way for urban renewal purposes and the need to move because of a change in a street or highway for transportation or traffic rasons. There is no justification for such a distinction. The underlying principle in each case is that the utility company acquires a permission to use the street which is always subject to the police power of the state or local government to provide for the general welfare of its citizenry. If the general welfare requires a change in the arrangement of the utility's facilities, whether for traffic reasons,[7] drainage,[8] port development,[9] or the eradication of slums and blight under an urban

---

[7] *Bell Telephone Co. of Pennsylvania* v. *Pennsylvania Public Utility Comm'n*, 139 Pa. Super. Ct. 529, 12 A.2d 479 (1940); *Hampton Roads Sanitation District Comm'n* v. *Chesapeake*, 218 Va. 696, 240 S.E.2d 819 (1978).

[8] *New Orleans Gaslight Co.* v. *Drainage Comm'n of New Orleans*, 197 U.S. 453 (1905).

[9] *Port of New York Auth.* v. *Hackensack Water Co.*, 41 N.J. 90, 195 A.2d 1 (1963).

renewal plan,[10] the utility must, under the common law, make the change at its expense.

II. THE DECISIONS WHICH HAVE HELD THAT THE URA DID NOT CHANGE THE COMMON LAW CONTAIN SOUNDER LOGIC AND A MORE CAREFUL ANALYSIS THAN THAT FOUND IN THE OPINION OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

The contest here is whether or not the Congress abrogated the common law regarding payment of utility relocation costs when it enacted the URA. The Court of Appeals for the Fourth Circuit ruled that it did, while all of the other courts which have considered the question have ruled that it did not. The better analysis is found in the latter group of decisions.

A. The decision of the Circuit Court of Appeals for the Fourth Circuit

The heart of the decision of the Court of Appeals for the Fourth Circuit in this case, insofar as it applies to the intent behind the passage of the URA, may be found in the following language:

> Thus the Act was intended to extend benefits uniformly to persons who are displaced by federal acquisitions of real property for federal programs. Exclusion of utilities from the Act's coverage would run counter to that purpose.
>
> In the absence of any clear legislative intent to exclude utilities, it is this court's duty to apply the literal language of the statute. Doing so, we find that a utility comes within the Act's definition of 'business' and thus is a 'displaced person' under the Act (A. 70-71).

The URA was intended to bring uniformity to the application of *existing* laws, to follow the pattern set by

---

[10] *Central Maine Power Co.* v. *Waterville Urban Renewal Auth.*, 281 A.2d 233 (Me. 1971).

the Federal-Aid Highway Act as closely as possible, and, above all, to provide assistance to individuals, particularly the poor and elderly, small businesses and farmers. The URA sought to eliminate *unfair* burdens on people who had no means to cope with the trauma of dislocation.[11] This rationale does not apply to a state controlled utility company which through the return allowed on its rate base routinely receives the revenues needed to fund the expected costs of relocation (Stipulation, A. 44).

Nor must utilities be *included* as beneficiaries under the URA in the absence of any clear legislative intent to *exclude* them, as was ruled by the Court of Appeals (A. 70). To the contrary, where there is intact a well recognized common law rule, the legislature must show a clear intent to *change* that rule, and a clear indication of what the new rule will be.[12] This was recognized by the other courts which have considered the question.

B. Other courts which have construed the URA have held that a utility company is not a "displaced person" with reference to the relocation of transmission facilities

The District Court below and those other courts which have construed the URA in circumstances similar to the case at bar have each read the URA in context with the settled common law. They have refused to abrogate the common law without specific statutory language requiring such a change.[13] The rationale is well stated by the Boise,

---

[11] Sen. Rep. No. 91-488, 91st Cong., 1st sess. 6-8 (1969), Comments by Sen. Muskie.

[12] *Delaware River Port Auth.* v. *Pennsylvania Public Utility Comm'n*, 393 Pa. 639, 145 A.2d 172 (1958); *Port of New York Auth.* v. *Hackensack Water Co.*, 41 N.J. 90, 195 A.2d 1 (1963).

[13] *Artesian Water Co.* v. *State Dept. of Highways and Trans.*, 330 A.2d 432 (Del. 1974); *Pacific Telephone & Telegraph Co.* v. *Redevelopment Agency of Glendale*, 151 Cal. Rptr. 68, 87 Cal. App.3d 296 (1978); *Mountain States Telephone & Telegraph Co.* v. *Boise Redevelopment Agency*, No. 52891 (Dist. Ct. Idaho, Oct. 27, 1980),

Idaho court in *Mountain States Telephone & Telegraph Co.* v. *Boise Redevelopment Agency*, (Petition for Certiorari, Appendix C, pp. C-22, 23) as follows:

> The overwhelming common law view in this country is that public utilities are not entitled to reimbursement for costs incurred while relocating its equipment to make way for governmentally sponsored projects. The U.R.A., if it is held to reverse this well-established rule, is to be regarded as a statute in complete derogation of common law.
>
> > 'Unless clearly so stated and apparently and evidently so intended, a statute will not be construed to have changed common law.' (Citations omitted).
>
> Given the stated intent of Congress to unify and coordinate the various federal relocation assistance programs, the state of the common law, and the consequent failure of Congress to clearly provide for the needs of the public utilities and their relocation requirements, it is the opinion of this court that the U.R.A. was not intended to include within its coverage the reimbursement sought by the plaintiffs in this action.

C. This court refused a claim for relocation benefits under the "written order" clause of the URA which was based on the theory that the right supporting the claim was implied in the language of the URA

In *Alexander* v. *U.S. Department of Housing and Urban Development*, 441 U.S. 39 (1979) this Court construed the "written order" section of the URA.[14] There

---

reprinted in Appellant's Petition for Certiorari at p. C-1; *Lone Star Gas Co.* v. *Landrieu*, No. 80-100-C (E.D. Okla. March 30, 1981), reprinted in Joint Appendix at p. 319; *National Fuel Gas Distribution Corp.* v. *Niagara Frontier Transp. Auth.*, Civil No. 78-843 (W.D.N.Y. Feb. 6, 1980).

[14] C&P makes no contention that the "written order" clause is applicable. There was no written order in this case.

the Court was called upon to interpret language which was broad enough, if literally construed, to permit two possible interpretations. This Court reviewed the statute and its legislative history and concluded that the more narrow construction was proper. The Court said:

> The structure of the Relocation Act confirms our conclusion that Congress did not expect to provide assistance for all persons somehow displaced by Government programs. The benefit provisions involved here are but one part of a comprehensive statute that also establishes the procedures agencies must follow when acquiring land for federal programs . . . . This placement in itself suggests that Congress was concerned with burdens related to Government acquisition of property, as opposed to a broader range of dislocation problems. . . . (p. 60)

In *Alexander*, this Court looked for indications from the Congress as to what the URA meant. For example, in construing the meaning of §§ 101(6), 202 and 205, this Court there held that the three sections should be given similar scope since there were no indications that Congress intended a different result.

Further, in deciding whether the acquisition of property by HUD at foreclosure constituted an "acquisition" within the meaning of § 101(6) of the URA, this Court held in *Alexander* that it did not, where there was no evidence that Congress intended to provide relocation benefits under circumstances which did not involve acquisition. (*Id.* at 65)

The New Jersey Supreme Court in *Port of New York Authority* v. *Hackensack Water Co.*, 41 N.J. 90, 195 A.2d 1, 11 (1963) sought to determine whether the legislature "has revealed" an intent to change the common law.

In contrast to the proper search for an *expression* of Congressional intent in *Alexander* and *Port of New York Authority*, the Court of Appeals permitted the C&P claim

because it was not specifically *excluded*. We submit this reverses the proper burden of persuasion.

D. The comparison of C&P's right to those of a tenant at will used by the Court below is not appropriate

> The Circuit Court of Appeals stated: HUD's reliance on the common law is unconvincing. The Act was intended to create rights that were not recognized at common law. A tenant at will, for example, can recover relocation expenses as a displaced person under the Act even though the common law recognized no such right. . . . (A. 68-69)

We agree that the URA created some rights which did not exist at common law. This occurred in those instances where the statute and its legislative history clearly manifested the congressional intent to make the change. Thus, the URA was effective to change the common law rights of tenants at will. Congress plainly manifested its intention to cover tenants who had no previous right to compensation. They were prominently and extensively the subject of public hearings and were often mentioned in the committee reports.[15] Finally, they were provided for in the URA under § 4624. The only condition for eligibility imposed by Congress is that the applicant must have been displaced from a dwelling which he "actually and lawfully occupied" for "not less than ninety days prior to the initiation of negotiations for acquisition of such dwelling." 42 U.S.C § 4624. There is no evidence of any intent by Congress to change the law as to utility relocation in the same manner as it did for tenants.

---

[15] House Comm. on Public Works, Select Subcomm. on Real Property Acquisition of the House Committee on Public Works, 88th Cong., 2d Sess., Study of Compensation and Assistance for Persons Affected by Real Property Acquisition in Federal and Federally Assisted Programs 15-20 (Comm. Print 1965) (hereinafter Select Subcommittee Report).

This provision for a tenant (including a tenant at will) is consistent with the central thrust of the URA, which is to ameliorate the undue hardship on those individuals and families directly affected by the property acquisition. The tenants at will are generally poor, usually live in hovels unfit for human habitation, and are without the means of securing alternate housing. These people constitute a substantial portion of the tenants described in the Select Subcommittee Report,[16] which deals with the human disruption expected in Federal and federally assisted programs. When the home in which such a person lives is taken, the tenant must find another place and pay the rent demanded. When C&P is directed to move, it is given a new location and the relocation funds are both anticipated and provided for in its rate structure. Finally, it pays nothing for the new location.

E. If the cost of relocating its transmission lines is to be shifted away from C&P, a clear statutory mandate is required to change the existing common law

The Supreme Court of New Hampshire in *Opinion of the Justices*, 101 N.H. 527, 132 A.2d 613 (1957) upheld the constitutionality of a state statute passed to implement the relocation provisions of the Federal-Aid Highway Act of 1956. The Federal act specifically authorized reimbursement to a state which had paid costs to utilities in conformance with local law. The court said:

> Utility facilities are located within public highways with permission and license and are subject to reasonable regulation and control under the police power. *Bourget* v. *Public Service Company*, 98 N.H. 237, 97 A.2d 383, RSA 254: 19-23. Consequently, utilities are required to relocate their facilities at their own expense whenever public health, safety or convenience require change to be made. *Detroit Edison Co.* v. *City of Detroit*, 332 Mich. 348, 51 N.W.2d 245,

[16] *Id.* at 15, 16.

> *Jamaica Water Supply Co.* v. *New York*, 280 App. Div. 834, 114 N.Y.S.2d 79, affirmed 304 N.Y. 917, 110 N.E.2d 739; 12 McQuillin, Municipal Corporations (3rd ed.) §§ 34.74, 34.77. There "* * * has been no dissent from the common law rule as enunciated by numerous courts that, *in the absence of a clear statutory mandate* shifting the burden to the State, utilities are obliged to relocate at their own expense their facilities located in public highways when required to facilitate highway improvements." Public Utility Relocation Incident to Highway Improvement, House Document 127, p. 57 (84th Cong. 1st Session 1955). See also, RSA 254:23. (Emphasis added) (p. 614)

The Supreme Court of Pennsylvania in *Delaware River Port Authority* v. *Pennsylvania Public Utility Commission*, 393 Pa. 639, 145 A.2d 172 (1958) noted that utilities in that state historically occupied highway rights-of-way free of cost but subject to control and regulation under the police power. In such cases, property rights are acquired and the utilities can be ordered to relocate their facilities at their own expense. However, the Court conceded that this common law rule could be changed by a *specific statutory mandate* of the legislature. It then described the language required to effectuate such a change:

> A legislative intent to effect any departure from a firmly established policy of the law must be expressed in clear and unequivocal language. Well-settled and established principles of law are not to be regarded as changed unless the terms of the new legislation unmistakably and unambiguously indicate such a change. 'In the absence of express declaration, the law presumes that the act did not intend to make any change in the common law, for if the legislature had that design they would have expressed it.' (pp. 175-176)

The Court of Appeals for the Fourth Circuit was wrong when it changed the common law without a clear statu-

tory mandate from the Congress. *Norfolk & Western Railway Co.* v. *Virginian Railway Co.*, 110 Va. 631, 66 S.E. 863 (1910), *Shaw* v. *Merchants' National Bank of St. Louis*, 101 U.S. 557 (1880) and *Port of New York Authority* v. *Hackensack Water Co.*, 41 N.J. 90, 195 A.2d 1 (1963). The Virginia rule (which follows the common law) is that the utility must move when directed by local authority, and must itself bear the costs of such relocation. There is no clear mandate in the NRA to change the common law.

III. THE LEGISLATIVE HISTORY OF THE URA DOES NOT SUPPORT THE CLAIM BEING ASSERTED BY C&P

Congress became involved in the problems of persons displaced from real property as early as 1935.[17] After World War II, there was an expansion of acquisition of property by various federal or federally-assisted programs, including the massive federal interstate highway system. Various methods of assistance were devised and in 1961 the House Public Works Committee established the Select Subcommittee on Real Property Acquisition. The charge to the Select Subcommittee[18] was to

> make a comprehensive, impartial and nonpartisan study in order to determine whether owners, tenants, and other persons affected by the acquisition of real property in Federal and federally assisted programs receive fair and equal treatment, and adequate compensation, considering the value of their property and the losses and expenses they incur on being required to move from their homes, farms, or business locations.

The comprehensive Select Subcommittee Study was completed in 1964. It contained recommendations for

---

[17] Tennessee Valley Authority Act of 1933, ch. 32, 48 Stat. 58, as amended, 49 Stat. 1080.

[18] Select Subcommittee Report, *supra* note 15, at 1.

uniformity in land acquisition procedures and provisions for relocation assistance to persons displaced by the acquisition. The Summary and Conclusions of the Select Subcommittee Study emphasized the accelerated pace of acquisition by Federal and federally-assisted programs; the substantial losses and expenses suffered by owners and tenants which were not covered by market value concepts of just compensation; the plight of residential tenants and small businesses; the burdens on low or moderate income families, the elderly and the non-white displacees; the special problems of small businesses which are sometimes forced out of business; the lack of financing and counseling for the unsophisticated displacees; the judicial precedents which limit compensation to market value standards; the variances in existing Federal and federally-assisted programs and the need for uniformity in those programs; and the need for simplified procedures to obtain reimbursement for tenants and property owners.[19]

After the Select Subcommittee filed its report in 1964, two related measures were adopted by the 90th Congress: the Federal-Aid Highway Act of 1968 and the Housing and Urban Development Act of 1968. The Highway Act mandated certain relocation assistance to those displaced by the Federal-Aid Highway system, but made no change in the existing provisions of Section 123 pertaining to utility relocation. The Housing and Urban Development Act supplemented relocation assistance in housing and urban renewal programs. All of this was recited as part of the background for S.1, the Senate version of the URA. (S. Rep. No. 91-488, 91st Cong. 1st Sess. [1969]). The Committee report described the purpose of the proposed legislation as follows:

---

[19] Select Subcommittee Report, *supra* note 15, at 105-113.

> In large part, S. 1 is designed to permit the Federal government to *deal consistently and fairly* with all those whose property is taken for public projects and all those who are displaced from their homes and their businesses. It follows as closely as possible the substantive provisions of the Housing and Urban Development Act and the Federal Highway Act, modifying them only as necessary to achieve a system of requirements and aids that can be applied uniformly in all Federal and federally assisted programs. (S. Rep. No. 91-488, 2) (Emphasis added)

The House report, H.R. Rep. No. 91-1656, 91st Cong., 1st Sess., (1970) stressed uniform and equitable treatment.

> As the thrust of Federal and federally assisted programs have shifted from rural to urban situations, it became increasingly apparent that the application of traditional concepts of valuation and eminent domain resulted *in inequitable treatment* for large numbers of people displaced by public action. When applied to densely populated urban areas, with already limited housing, the result can be catastrophic for those whose homes or businesses must give way to public needs. The result far too often has been that a few citizens have been called upon to bear the burden of meeting public needs.
>
> . . .
>
> The bill as recommended is necessary to *eliminate the great inconsistencies* that exist among Federal and federally assisted programs with respect to the amount and scope of payments, other assistance provided, and assurances of housing offered. It recognizes that relocation is a serious and growing problem in the United States and that the pace of displacement will accelerate in the years immediately ahead. It recognizes that advisory assistance is of special importance in the relocation process especially for the poor, the nonwhite, the elderly, and people engaged in small business. It recognizes the

need for more equitable land acquisition policies in connection with the acquisition of real property for these programs. In short, this legislation recognizes that the Federal Government has a primary responsibility *to provide uniform treatment* for those forced to relocate by Federal and federally aided public improvement programs *and to ease the impact* of such forced moves.

This legislation refines and strengthens the basic principles and programs in S. 1. as passed by the Senate. It provides *a humanitarian program* for relocation payments, advisory assistance assurance that comparable, decent, safe, and sanitary replacement housing will be available for displaced persons prior to displacement, economic adjustments, and other assistance to owners and tenants displaced from their homes, farms, and places of business. It establishes a uniform policy on real property acquisition practice for all Federal and federally assisted programs. And, perhaps most important of all, it gets to the heart of the dislocation problem by providing the means for positive action to increase the available housing supply for displaced low and moderate income families and individuals. (Emphasis added) (Reprinted in 1970 U.S. Code Cong. & Admin. News 5851-5852)

Applying these concepts to the C&P claim produces no reason for allowing the claim. *Uniformity* as to utility relocation already existed. Utilities remove their lines without compensation absent a state statute to the contrary. There is no unfairness or any "shattering effect" on C&P by reason of the urban renewal program. Its state approved rate structure already provided monies to move the lines, and C&P has moved its lines for public purposes without reimbursement ever since it obtained its Franchise. If the legislature intended to shift the burden of relocation costs from the customers of the utilities it

would do so only after the type of extensive debates which took place in the several states after passage of the Federal-Aid Highway Act.[20]

The legislative history of the URA stresses the impact of relocation on individuals, on small businesses and the poor. Nowhere do the committee reports evidence a discussion of the relocation of utility lines. This is remarkably different from the legislative history of the Federal-Aid Highway statute, where utility relocation was directly discussed and included in the legislation.

A different result would be obtained if C&P were claiming moving expenses for the cost of moving its furniture or equipment from an office building it owned or leased and which was being acquired under a Federal or federally assisted project. In that situation C&P would qualify for relocation benefits. It is a person under § 4601(5). It would have moved personal property as the result of the acquisition of real property. There would be no countervailing common law rule requiring a different result. Under this hypothetical, the literal language of the statute would apply and C&P would be entitled to relocation benefits.

---

[20] In S. Rep. No. 1407, 85th Cong., 2d sess. 28 (1958), the committee, after reviewing the legislative actions in the several states said:

> **The committee did not contemplate this drastic change in existing practices when the 1956 act was enacted, and realizes that the use of Federal funds for reimbursement to the State for this purpose will increase substantially, thereby reducing the amount of Federal funds available for construction of highways.**

IV. IN CONTRAST TO THE ABSENCE OF EVIDENCE OF CONGRESSIONAL INTENT TO PROVIDE REIMBURSEMENT FOR UTILITY RELOCATION IN THE URA, THE FEDERAL-AID HIGHWAY ACT AND ITS LEGISLATIVE HISTORY DEMONSTRATE A CLEAR INTENT TO PERMIT REIMBURSEMENT FOR UTILITY RELOCATION UNDER CERTAIN CIRCUMSTANCES

In the committee reports preceding adoption of the Federal-Aid to Highway Acts of 1954 and 1956, specific mention was made of the problems involved in utility relocation caused by the highway program. This is in stark contrast to the absence of any such discussion in the decade during which the URA was under careful and extensive consideration in the House and the Senate.

Senate Report No. 1093, Mar. 25, 1954 (to accompany S. 3184), reprinted in 1954 U.S. Code Cong. and Admin. News, 2162 recites, at page 2174 the following:

> UTILITY RELOCATIONS
>
> The Committee heard considerable testimony from owners and operators of various public utilities concerning the heavy financial burden placed upon them when reconstruction or modernization of highways requires that their facilities be moved from their prior locations on the highway right-of-way. It was stated that in some instances the relocation expense represented such a large proportion of their total capital investment that they would be forced out of business, thereby depriving large numbers of customers from needed services. In other cases it was stated that they would have to make large increases in the rates charged to their customers.
>
> In most instances, these utilities are occupying the public highway rights-of-way by sufferance, and it appears that they receive some advantage because of the convenience of the existence of the highway as a means of access for maintaining and servicing their facilities. The utilities are now seeking legislation

in the Federal-Aid Act which would require that they be reimbursed for relocation of their facilities, either wholly or in part from Federal funds.

The data presented at the hearings seem to show that some inequity does exist in the assessment of utility relocation costs under present conditions. The testimony does not indicate, however, what, if any, responsibility might be attributed to the Federal Government for this situation. On the contrary, it appears that such inequities as may exist arise *largely because of the relationships between the utilities and the State and local governments* which own or control the highway rights-of-way.

Under existing Federal-aid law, the Federal Government can and does reimburse the States for the Federal matching share of the cost of construction of Federal-aid roads. If the State, pursuant to its own laws and regulations, is able to certify that utility relocation expense is a proper charge to the construction cost of a highway, then that expense is included in the total construction cost for which the State is reimbursed by the Federal Government to the extent of the Federal share, which is basically 50 percent of the total cost. *If, however, because of inhibitions in its laws and regulations, the State is unable to certify utility relocation expense as a proper charge to the highway-construction cost, then there is no avenue under existing Federal-aid law by which any Federal funds could be applied toward meeting the relocation expense.*

It is clear that such inequities as may exist are due to relationships between the utilities and the State or local governments rather than relationships with the Federal Government. It would seem *neither feasible nor desirable for the Federal Government to give direction to those local relationships by force of application of Federal funds.* Furthermore, no evidence was presented as to any attempt to resolve the local relationships among the parties directly involved. (Emphasis added)

No action on this subject was taken in 1954. Instead, a study was authorized and its findings were reported to the Congress in April, 1955.[21] Thereafter, in the Federal-Aid Highway Act of 1956, a specific provision was adopted authorizing Federal reimbursement to the states when a state made relocation payments permitted under state law.[22] The General Assembly of Virginia then enacted a statute authorizing payment of utility relocation costs in the Interstate Highway System in cities and towns. (Va. Code § 33.1-55, formerly § 33-36.9)

Thus, the General Assembly of Virginia effectively changed the common law rule and permitted payment of utility relocation costs in specified and limited instances involving Federal highway projects. This enabled Virginia to take advantage of the federal reimbursement available under the Federal-Aid Highway Act. If the Congress and the General Assembly, in adopting the Federal and state versions of the URA, had intended to further amend the common law so as to permit payment for utility relocation in other than highway construction, they would have made express provision therefor.

---

[21] H.R. Doc. 127, 84th Cong., 1st Sess. (1955).

[22] Section 11 of the Federal-Aid Highways Act of 1956 (later § 123 of the Federal-Aid Highway Act of 1958) provides:

> (a) When a State shall pay for the relocation of utility facilities necessitated by the construction of a project on the Federal-aid primary or secondary systems or on the Interstate System . . . Federal funds may be used to reimburse the State for such costs in the same proportion as Federal funds are expended on the project. Federal funds shall not be used to reimburse the State under this section when the payment to the utility violates the law of the State or violates a legal contract between the utility and the State. . . .

V. THE ADMINISTRATION OF THE URA BY FEDERAL AGENCIES AND THE SUBSEQUENT ACTION OF CONGRESS SUPPORT THE CONTENTIONS OF NRHA

A. The agencies

The URA has a very wide scope of application.[23] When the instant suit was filed, at least twenty Federal agencies were involved in administering the fifty or more programs affected under the URA, yet none of the regulations promulgated by those agencies authorized the payment of benefits to utility companies for relocating their transmission lines.[24]

---

[23] Senator Muskie stated in 1969 that "there are more than 50 Federal Programs which result in the condemning of land and, literally, the bulldozing of hundreds of thousands of people from their homes and businesses each year." Sen. Rep. No. 91-488, *supra*, Note 11, at 6.

[24] The federal agencies or departments and the respective regulations involved are: Department of Agriculture, 7 CFR Part 21 (1981); Department of the Army, 32 CFR Part 641 (1981); Department of Education, 34 CFR Part 15 (1981); Department of Health and Human Services, 45 CFR Part 15 (1981); Department of Housing and Urban Development, 24 CFR Part 42, (1981); Department of the Interior, 41 CFR Part 114-50 (1981); Department of Justice Property Management Regulations, 41 CFR Part 128-18 (1981); Department of Labor, 29 CFR Part 12 and 29 CFR Part 91 (1981); Department of the Navy, 32 CFR Part 742 (1981); Department of Transportation, 49 CFR Part 25 (1981); Economic Development Authority, 13 CFR Part 308 (1981); Environmental Protection Agency, 40 CFR Part 4 and 40 CFR Part 30.405-2 (1981); Federal Highway Administration, 23 CFR Part 740 (1981); General Services Administration, 41 CFR Part 101-18 (1981); National Oceanic and Atmospheric Administration, Department of Commerce, 15 CFR Part 916 (1981); Pennsylvania Avenue Development Corporation, 36 CFR Part 904 (1981); Soil Conservation Service, Department of Agriculture, 7 CFR § 652 (1981); Tennessee Valley Authority, 18 CFR Part 1306 (1981); United States Postal Service, 39 CFR Part 777 (1981); and Veterans Administration, 38 CFR Part 25 (1981).

During hearings conducted by the House Committee on Public Works, Mr. Richard Van Dusen, then Under Secretary of HUD, testified on behalf of his agency in support of the URA. He cited HUD's extensive experience in relocation dating back to 1956. Mr. Van Dusen outlined the statutory changes in the Housing and Urban Development Acts of 1968 and 1969. He noted that in 1969 alone HUD spent $44 million to assist 21,600 families, almost 18,400 single persons and more than 9,000 business concerns. He referred to an administrative regulation limiting business relocation benefits to $25,000.00 and noted relocation payments from December, 1965 through June of 1969 to 34,355 businesses, of which about 400 filed claims for expenses exceeding $25,000. Nowhere in this extensive description of HUD experience in relocation was there any mention of payments in reimbursement of utility relocation costs. Hearings before the Comm. on Public Works House of Representatives 14898, H.R. 14899, S.1 and related bills, 91st Cong., 1st & 2d Sess. (1969-1970) 1025-1029, 1034-1035.

The HUD Urban Renewal Handbook RHA, Sec. 7209.1 which was in effect before passage of the URA (and which was not amended in this respect after passage of the URA) specifically disallows relocation benefits to a utility unless authorized by state law. (The HUD regulations are printed as Appendix A in the Amicus Brief filed by the City of Boise, Idaho, *et al.* in support of the Petition for Certiorari. The provision relating to private utility lines is printed at p. 63 of Appendix A.) The current HUD regulations which appear at 24 CFR § 2.1 *et seq.* contain no provision for or reference to eligibility of a utility for reimbursement for removing its transmission lines from the public right-of-way.

B. Inconsistent Congressional action

It is manifest that the Congressional Committees which studied the problem and then recommended adoption of the URA were intimately familiar with the provi-

sions of the Federal-Aid Highway Acts of 1954, 1956, 1958 and 1968. The Senate Committee on Government Relations described S.1 as following the Federal-Aid Highway Act as closely as possible (S.Rep. No. 91-488, 91st Cong., 1st Sess. 2, 1964). When the URA took its final form it repealed the relocation assistance provisions of Chapter 5 of the Highway Act and incorporated them into the URA. Yet it retained Section 123 of that chapter which dealt with utility relocation. This manifested an intent by Congress to leave unchanged the law relating to utility relocation costs.[25]

Further corroboration of the fact that Congress, in passing the URA, did not intend to provide private utility companies any relocation benefits is demonstrated by a subsequent development in the Congress. The District of Columbia Redevelopment Land Agency was classified as a "state agency" in § 101(3) of the URA. Accordingly, the relocation activities of the urban renewal projects of that agency are governed by the URA. On October 14, 1972, Congress enacted the District of Columbia Public Utilities Reimbursement Act of 1972, P.L. No. 92-495, 86 Stat. 812 (1972), specifically providing for the reimbursement of utility relocation costs caused by an urban redevelopment project carried out by the District of Columbia Redevelopment Land Agency. This action by Congress demonstrated that the URA had not authorized such reimbursement, for if it had, Public Law No. 92-495 would have been unnecessary.

In H.R. Rep. No. 92-906 92d Cong., 2d Sess. (1972), the Committee on the District of Columbia specifically noted that without the enactment of the District of Columbia Public Utilities Reimbursement Act, utility relocation costs would be borne by the utility's consumers saying:

---

[25] *Artesian Water Co.* v. *State Dept. of Highways & Transp.*, 330 A.2d 432 (Del. 1974).

> Section 2 of the H.R. 13533 would amend the District of Columbia Redevelopment Act of 1945 to require payment by the RLA of the cost of relocating, adjusting, replacement, removing, and abandoning utility facilities whenever such actions become necessary because of an urban redevelopment plan or modification thereof. Payment of such costs would be made to the utility owning such facilities and would be treated as an allowable cost of the Urban Renewal redevelopment project.
>
> Generally in the District of Columbia, costs incident to the removal or relocation of electric, telephone, and gas utility facilities, when such removal or relocation is necessitated by governmental action, have been borne by the public utilities affected thereby. This long-standing requirement is based on the view that utility companies acquire no vested interests in the public space of the District of Columbia by the grant to them of franchises to construct and maintain utility lines, conduits, pipes, and related facilities. Hence, when the needs of the District or Federal governments so require in connection with the construction of public buildings and other public works, such utilities are now obliged to remove, divert, or relocate their facilities without cost to the respective governments.

The Committee recommended passage of the proposed legislation and concluded with the following statement:

> Unless such relief is granted to the public utilities for the costs of relocating or abandoning their facilities, such costs must eventually be passed on to the users of the utilities' services. This legislation would obviate added charges resulting from such projects, extraordinary property losses on facilities no longer used, and the higher costs brought about by expenses for relocation. H.R. Rep. 92-906, 8.

This action by the Congress was not directed at national legislation. It is analagous to the actions taken by many state legislatures following passage of the URA.

Its significance lies in the difference between the language used in the District of Columbia Act and the URA. The District of Columbia Act intended to and did deal with the cost of utility relocation in urban renewal projects. This is the type of specific language which is required to change the common law. It does not anywhere appear in the URA or in the Virginia version of that statute.

Further support for the NRHA position is found in an opinion of the Comptroller General of the United States dated September 15, 1971 and addressed to the Architect of the Capitol, The Honorable George M. White. Mr. White had received a request from Potomac Electric Power Company for reimbursement for relocation of its utilities from the public right of way incident to construction of the Library of Congress James Madison Memorial Building. The Comptroller General recommended denial of the claim, noting the general rule that utilities must relocate at their expense when required to do so by the government, and recognizing the need for specific statutory authority to permit such payments. Even though this transpired after enactment of the URA, the Comptroller General stated he knew of no law which would justify payment of the PEPCO claim. (51 Comp. Gen. 167 [1971]).

VI. UNDER VIRGINIA LAW THE C&P FACILITIES INVOLVED IN THIS CLAIM ARE REAL PROPERTY, NOT PERSONALTY

C&P claims reimbursement for relocating its transmission cables and the massive conduits, concrete structures or telephone poles used to support them (its "facilities"). As a threshold requirement for benefit eligibility under the URA, C&P must "move [its] personal property from real property." 42 USC § 4601(6) Hence, C&P must demonstrate that its facilities are personal property. The question whether the facilities are real or personal prop-

erty is to be decided under the law of Virginia, the state where they are situated. *Humble Oil & Refining Co.* v. *Copeland*, 398 F.2d 364 (4th Cir. 1968).

These facilities meet the definitional requirements of "real property" as set out by the Supreme Court of Virginia in *Transcontinental Gas Pipe Line Corp.* v. *Prince William County*, 210 Va. 550, 172 S.E.2d 757 (1970). They are certainly annexed to the realty. They are adapted to the use to which the street beds are adapted.[26]

There was every intention of leaving these facilities under the ground indefinitely, because it was too expensive to change them around (A. 110-127, 140). Speaking to these requisites for the definition of real property, the Virginia court in *Transcontinental* said:

> In the present case the evidence shows that Transco's gas mains are buried in the ground, and thus annexed to the realty. The mains are adapted to the use of the property to which they are annexed, and they are essential to the purpose for which the perpetual easements were acquired and are used. Testimony that the gas mains could be used for a hundred years, because of the methods employed by Transco to preserve and protect them, clearly indicates that it was Transco's intention to permanently annex them to the land in which it has perpetual rights of way and easements.
>
> The fact that Transco reserved the right to remove the mains under the provisions of the right of way and easement agreements does not support the conclusion that the mains were not intended to become a part of the realty. The legal right to remove the mains is not synonymous with the intent to remove them. The gas mains are a permanent part of Transco's system and will remain in place for their

---

[26] A utility is permitted to use the public way because it serves a public interest. *Port of New York Auth.* v. *Hackensack Water Auth.*, 41 N.J. 90, 195 A.2d 1, 4 (1968).

> normal life, subject only to the necessity of replacement, maintenance and repair. Thus it was clearly the intent of Transco to make the gas mains a part of the realty. (p. 556)

C&P recognized the force of *Transcontinental*, and wrote to the Commissioner of Revenue of the City of Norfolk asking that its facilities be classified for tax purposes as realty because they were realty under the law of fixtures (A. 292-293). We agree with C&P's conclusion on this point.

In the court below C&P relied on the decision of the Supreme Judicial Court of Maine in *Bangor-Hydro Electrict Co.* v. *Johnson, State Tax Assessor*, 226 A.2d 371 (Me. 1967). In that case the Court held that pole lines which were sold from Bangor-Hydro Electric Company (Bangor) to New England Telegraph and Telephone Company were personal property for the purposes of assessment of sales taxes. The Court noted that Bangor had the burden of proving tax exemption and thus ruled that the poles (made of logs which were personalty) had not become sufficiently annexed to the real estate to lose that character. The more persuasive reasoning is found in *Transcontinental, supra*, where the court recognized the accession of the pipe lines to the realty.

The Court of Appeals below added to the *Transcontinental* criteria for converting personal property to fixtures the additional requirement that the personalty must be installed or affixed to realty owned by the owner of the personalty. This is not the law of fixtures. Although it is true that Transcontinental Gas Pipe Line Corporation installed its lines in land over which it had acquired a permanent right-of-way, the decision in *Transcontinental* did not turn on that fact. The most that could be said of the effect of such ownership is that it resolved any doubt as to the owner's intention. (See, *Transcontinental*, 210 Va. at 556.)

The facilities are real property under Virginia law. Hence, C&P does not qualify as a "displaced person" because it did not move *personal* property as required under the URA.

VII. C&P DID NOT MOVE ITS TRANSMISSION LINES AS A RESULT OF THE ACQUISITION OF LAND

A second eligibility requirement which C&P must, but cannot, meet in order to be entitled to benefits under the URA is that it must move its personal property from real property "as a result of the acquisition of such real property." 42 USC § 4601(6) (Emphasis added)

A. C&P moved its facilities because of the requirements of the Franchise

The eradication of blight in Norfolk has been in progress for a long time. The successive redevelopment and conservation plans resulted from cooperative planning involving the City, NRHA, neighborhood associations, and advice from the citizenry by way of public hearings (A. 187-190). Mr. Tucker, the C&P field engineer in charge of the relocation activities, testified that C&P stayed in close touch with the progress of the urban renewal plans, and that he heard from the City about closing a street before he knew of it in any other way (A. 106).

No coercion was needed to make C&P move its facilities. C&P understood that it must move if the streets were closed or rearranged (A. 106-108, 219-216). The inherent nature of the Franchise dictated this result for two reasons: first, the Franchise specifically reserved to the City of Norfolk the right to alter (or eliminate) the privilege granted C&P without any liability (A. 241); and second, the rights given under the Franchise were always subordinate to the needs of the general public. Hence, the utility must always be ready to relocate its transmission lines at its expense. The same relationship was described as follows by the Supreme Court of New

Jersey in *Port of New York Authority* v. *Hackensack Water Co.*, 41 N.J. 90, 195 A.2d 1, 4 (1963):

> If the case turned upon a delegation of such power, we would find it, but we think the utilities misconceive the source of their obligation to relocate. That obligation does not originate in a specific order to relocate. Rather it antedates the occasion for relocation and rests upon the common law's view of the rights and responsibilities of the recipient of a so-called franchise to use the public streets. A utility company is permitted to locate its lines within the public right of way as a use ancillary to the principal and primary use of the way by the public. (citations omitted.) It is permitted to use the public way because it serves a public interest, but since its venture is for gain and since in any event the primary purpose of the public easement is the public' own use of it, the utility's interest in the public [illegible] is subordinate to the public's enjoyment of it. Hence the utility runs the risk that the public welfare may require changes in the road which will call for relocation of its facilities.

Furthermore, when any street is closed there is no longer any public way in which the utility can place its facilities, and the right to occupy the public space is terminated. *Holden* v. *New York State Telephone Co.*, 31 A.D.2d 812, 298 N.Y.S.2d 256 (1969).

Thus, it is manifest that it was the nature of the Franchise itself, not the acquisition of any real property, which caused C&P to move its facilities.

B. The acquisition of land in the several projects, having been completed well before C&P was required to move, did not cause the relocation of the C&P facilities

A recitation of the events which led up to the relocation of the transmission lines will establish that this relocation was not the result of the acquisition of the land.

Long after C&P had laid its lines in the public streets, urban renewal plans were adopted which contemplated the acquisition of land and the subsequent demolition of buildings in specified sections of the City. The acquisition and demolition was done by NRHA with federal funds. Thereafter, the cleared land was readied for redevelopment. Public works were installed and new streets were laid out to accommodate prospective new development by public or private enterprise (A. 181-208). Each step was separate and took its own time. The acquisition of and clearance of the land was done by NRHA, but the rezoning and street closings were done by the City.

In this manner NRHA acquired each parcel of land which was designated for acquisition under the urban renewal plans, including all those which abutted streets or portions of streets which were to be closed, re-routed or widened. Under Virginia law the acquisition of a parcel of land abutting a public street carries with it the fee simple title to the land beneath the street, extending to the centerline of the street, subject only to an easement in favor of the public for public use and travel. *Heller* v. *Woodley*, 202 Va. 994, 998, 121 S.E.2d 527 (1961).

While the closing of a street extinguishes the public right-of-way, it is neither a taking nor a damaging of any property interest. *City of Lynchburg* v. *Peters*, 145 Va. 1, 133 S.E. 674, (1926).

Thus the acquisition of the land in which C&P had installed its facilities was accomplished *bit by bit* by NRHA. Each deed conveying a parcel abutting the street carried with it the underlying fee to the centerline of the street, subject to the public easement. This impediment to the title was removed, like the release of a deed of trust, by the city ordinance closing the street. This street closure perfected the title to the land in NRHA, but it did not compel any action on the part of C&P. The utility had to move only if and when a *new and different*

street pattern was prepared and ready to receive C&P's new facilities.

The right C&P gained by its Franchise was the general license to place its lines in the public streets of the City of Norfolk. No particular location was guaranteed. The case here is much like the situation in *Consumers Power Co.* v. *Costle*, 615 F.2d 1147 (6th Cir. 1980), where the Circuit Court of Appeals for the Sixth Circuit ruled that no relocation benefits were proper when gas lines were moved from one location to another within a public right-of-way. In the instant case, C&P was only required to move from one portion of the public system of rights-of-way to another location in the same system. A new and completely adequate location was offered each time, and without cost to C&P.

The term "acquisition" as used in the URA is tantamount to a taking in eminent domain, or by a negotiated sale. House Report 91-1656, reprinted in 1970 U.S. Code Cong. & Admin. News 5850-5851, cites the nationwide growth of the economy and the increasing demand for public facilities and services. The Report then takes note of the fact that the acquisition of land which had provided "residential, commercial, or other services" had become "the most difficult facet of many undertakings of public agencies." *Id.*

Thus, the URA is aimed at alleviating disproportionate hardships resulting directly from the *acquisition of land.* The term "just compensation", related as it is to fair market value, was demonstrably not providing adequate payments to persons who had to move against their will. The URA was enacted to provide additional benefits to owners and tenants who had no other source of reimbursement. There was no demonstrated reason for Congress to come to the rescue of the utility companies—and the URA did not.

C&P has not met its burden of showing that it moved its facilities as a *result* of the taking of real property.

Having failed to meet this second threshold requirement of the URA, C&P's claim must be denied.

CONCLUSION

The Court of Appeals' interpretation of the URA shifts the burden of the cost of moving utility transmission lines from the subscribers of the utility company to the general taxpayers. It dramatically alters state law and practice by judicial fiat, without the benefit of public hearings and without the careful screening which is available through the legislative process. It superimposes on the finely tuned, but varied, body of state law a simplistic federal rule which does not take into account or accommodate the complexities of the judicial decisions, statutes and constitutions of the individual states. The decision below would impose on localities a financial burden which they certainly did not anticipate, and one which they never intended to accept. The result is contrary to the rule established by this Court in *Pennhurst State School and Hospital* v. *Halderman*, 451 U.S. 1 (1981).

The URA is an excellent example of remedial legislation which has performed its function well in the decade since its passage. However, there is no reason for the law to be interpreted now in a manner which drastically disrupts the settled laws and procedures which have developed over the years (both before and after the URA) on the subject of utility relocation. If the law on this important subject is to be changed, the change should be made by the legislature, not by an appellate court.

The briefs amicus which have been filed in support of the NRHA position attest to the fact that the harsh and adverse impact of the decision below will be nationwide if it is not reversed. Localities with older central business districts have widespread deterioration and an outdated infrastructure. The revitalization of these central business districts will predictably involve land acquisition

aided by federal funds. Mass transit facilities, central parking garages, new office buildings, and new hotels and convention centers will all require new land use patterns involving the closing, vacating and rerouting of streets. If the decision below is allowed to stand, funds available to assist in these improvements will be curtailed and directed to a use not contemplated by the Congress. Already strained municipal budgets will be further impacted by the unexpected payments to the utilities.

The opinion below departs from the accepted and usual course of judicial analysis and accordingly arrives at the wrong result. The decision of the Court of Appeals should be reversed and the C&P claim should be denied.

Respectfully submitted,

FRANCIS N. CRENSHAW *
HOWARD W. MARTIN, JR.
ANN K. SULLIVAN
CRENSHAW, WARE & JOHNSON
1640 Virginia National Bank Building
One Commercial Place
Norfolk, Virginia 23510
Phone (804) 623-3000
Counsel for Petitioner

* Counsel of Record